

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

**SUPPLEMENTAL AUTHORITY FOR DEFENDANTS'**  
**PROPOSED JURY INSTRUCTION NO. 31**

Pursuant to Fed. R. Crim. P. 30, the Defendants respectfully submit this Supplemental Authority for Proposed Jury Instruction No. 31.

**JOHN BRUENS, MARY STEWART,  
MELISSA VAUGHN, and MARC SIROCKMAN,**

By their undersigned attorneys.

/s/ McKenzie E. Webster  
Tracy A. Miner  
McKenzie E. Webster  
Counsel for Marc Sirockman

/s/ Thomas McC. Souther  
Thomas McC. Souther  
Counsel for John Bruens

/s/ Mark. A. Berman  
Mark A. Berman  
Counsel for Mary Stewart

/s/ Adam S. Hoffinger  
Adam S. Hoffinger  
Counsel for Melissa Vaughn

**Dated:** May 1, 2007

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing motion was filed electronically in compliance with ECF procedures on this 1st day of May 2007.

/s/ McKenzie E. Webster

**DEFENDANTS' PROPOSED JURY INSTRUCION NO. 31**

**Good Faith Defense**

Supplemental Authority:

*See United States v. MacKenzie, et al.*, CR-01-10350 (D. Mass. 2004) (actual transcript of good faith instruction given to jury attached as Exhibit A). Judge Woodlock instructed the jury as follows:

"There is another dimension to the state of mind aspects of the fourth element requiring that the government show the particular defendant acted knowingly, willfully, and with specific intent. It is the issue of whether there was lack of good faith.

A defendant's good faith that his or her conduct was lawful is a defense to the charge of violating or aiding and abetting the violation or conspiring to violate the anti-kickback statute. This is because good faith, as I'll define it for you, is inconsistent with that knowledge or willfulness or specific intent that it is necessary for the government to prove beyond a reasonable doubt to establish a violation of the anti-kickback statute.

If a defendant acted in the belief or with an opinion he or she honestly held that his or her actions were not criminal, that defendant's actions are not criminal simply because the belief or opinion is inaccurate or incorrect or wrong. A person's honest mistake of judgment does not fall to the level of criminal conduct that comes within the ambit of the anti-kickback statute merely because the belief or opinion turns out to be inaccurate or incorrect or wrong.

Good faith has no precise definition, but it encompasses, among other things, a belief or opinion honestly held or an intention to avoid taking unfair advantage of circumstances. And so in determining whether the government -- and the government bears this burden -- has proven the defendant's knowledge, willfulness, and specific intent beyond a reasonable doubt, or whether there is a reasonable doubt such that the defendant instead may have acted in good faith, you must consider all of the evidence that bears on his or her state mind.

The burden of proving good faith does not rest with the defendant because, as I told you, no defendant bears a burden to prove anything to you in this case. It is the government's burden to prove beyond a reasonable doubt that a defendant acted knowingly, willfully, and with a specific intent. And in this connection, the government must satisfy you that the defendant did not act in good faith."

0001 TAP Jury Instructions Transcript

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS

4 \* \* \* \* \*

5 UNITED STATES, \*

6 Plaintiff \*

7 VERSUS \* CR-01-10350-DPW

8 ALAN MACKENZIE, HENRY VAN \*

9 MOURIK, DONNA TOM, DONALD PATTON\*

ERIC OTTERBEIN, RITA JOKIAHO,

CAREY SMITH, MARK SMITH,

Defendants \*

10 \*

11 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK  
12 UNITED STATES DISTRICT COURT JUDGE  
13 JURY TRIAL - DAY 49  
14 July 9, 2004

15 Courtroom No. 1 - 3rd Floor  
16 1 Courthouse Way  
17 Boston, Massachusetts 02210,  
18 9:00 A.M. - 11:45 A.M.

19 Debra M. Joyce  
20 Official Court Reporter  
21 John Joseph Moakley District Courthouse  
22 1 Courthouse Way - Suite 3204  
23 Boston, Massachusetts 02210

24 Method of Reporting: Computer-Aided Transcription

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1 APPEARANCES:

2 MICHAEL K. LOUCKS, ESQ., Chief, Health Care Fraud Unit,  
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4 Assistant United States Attorneys, U.S. Attorney's Office,  
5 1 Courthouse Way, Suite 9200, Boston, Massachusetts  
6 02210, on behalf of the United States.  
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10 MacKenzie, Defendant

11 ROBERT L. ULLMANN, ESQ., and CHRISTA VON DER LUFT, Nutter,  
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14 behalf of Henry Van Mourik, Defendant

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18 Donna Tom, Defendant

19 WILLIAM H. KETTLEWELL, ESQ., DANIEL J. CLOHERTY, ESQ., and  
20 SARA E. NOONAN, ESQ., Dwyer & Collora, LLP, 600 Atlantic  
21 Avenue, Boston, Massachusetts 02210-2211, on behalf of  
22 Donald Patton, Defendant.

## TAP Jury Instructions Transcript

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1       The government has to prove beyond a reasonable  
 2 doubt that the defendant was aware of the legal duties imposed  
 3 by the anti-kickback statute, even if the defendant did not  
 4 know the specific statute involved, that the defendant knew the  
 5 conduct was prohibited, and despite that awareness, the  
 6 defendant nevertheless engaged in conduct with the specific  
 7 intent to disobey or disregard the known legal duties.

8       There is another dimension to the state of mind  
 9 aspects of the fourth element requiring that the government  
 10 show the particular defendant acted knowingly, willfully, and  
 11 with specific intent. It is the issue of whether there was  
 12 lack of good faith. A defendant's good faith that his or her  
 13 conduct was lawful is a defense to the charge of violating or  
 14 aiding and abetting the violation or conspiring to violate the  
 15 anti-kickback statute. This is because good faith, as I'll  
 16 define it for you, is inconsistent with that knowledge or  
 17 willfulness or specific intent that it is necessary for the  
 18 government to prove beyond a reasonable doubt to establish a  
 19 violation of the anti-kickback statute.

20      If a defendant acted in the belief or with an  
 21 opinion he or she honestly held that his or her actions were  
 22 not criminal, that defendant's actions are not criminal simply  
 23 because the belief or opinion is inaccurate or incorrect or  
 24 wrong. A person's honest mistake of judgment does not fall to  
 25 the level of criminal conduct that comes within the ambit of

0059

1       the anti-kickback statute merely because the belief or opinion  
 2 turns out to be inaccurate or incorrect or wrong.

3       Good faith has no precise definition, but it  
 4 encompasses, among other things, a belief or opinion honestly  
 5 held or an intention to avoid taking unfair advantage of  
 6 circumstances. And so in determining whether the government --  
 7 and the government bears this burden -- has proven the  
 8 defendant's knowledge, willfulness, and specific intent beyond  
 9 a reasonable doubt, or whether there is a reasonable doubt such  
 10 that the defendant instead may have acted in good faith, you  
 11 must consider all of the evidence that bears on his or her  
 12 state mind.

13      The burden of proving good faith does not rest with  
 14 the defendant because, as I told you, no defendant bears a  
 15 burden to prove anything to you in this case. It is the  
 16 government's burden to prove beyond a reasonable doubt that a  
 17 defendant acted knowingly, willfully, and with a specific  
 18 intent. And in this connection, the government must satisfy  
 19 you that the defendant did not act in good faith.

20      Those are the elements of a substantive violation  
 21 of the anti-kickback statute. And you'll see from the copy of  
 22 the indictment you have been provided that counts two through  
 23 four are charged as substantive violations by Ms. Jokiah in  
 24 the District of Massachusetts. And let me pause again for a  
 25 moment to explain a little bit about federal court pleading

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1 requirements.

2       There are 94 federal districts in the United  
 3 States, one of those is the District of Massachusetts. Some  
 4 states have multiple districts. In New York there are  
 5 four: northern, southern, eastern, and western. And the way in  
 6 which the Constitution and federal statutes have organized the  
 7 allocation of business among the districts is that a criminal  
 8 charge can only be brought in the district in which either a  
 9 substantive offense is alleged to have taken place, or with  
 10 respect to a conspiracy, in which an overt act is alleged to